

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Erik Nelson d/b/a Kalamazoo Long Term Care Pharmacy,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-725

Decision No. CR2894

Date: August 16, 2013

**DECISION**

The National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), found Petitioner, Erik Nelson d/b/a Kalamazoo Long Term Care Pharmacy (Supplier No. 6705880001), not to be operational and revoked Petitioner's billing privileges as a supplier in the Medicare program. Petitioner appealed. Because Petitioner concedes that he did not timely inform NSC of a change in his business location and his former business location was vacant when an NSC inspector attempted a site inspection, I must affirm the determination to revoke Petitioner's billing privileges.

**I. Background**

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). In 2012, Petitioner's address on record with NSC was 610 South Burdick Street, Kalamazoo, Michigan 49007. *See* CMS Exhibits (Exs.) 2, 3. On November 15, 2012, Petitioner completed a transfer of his business from the 610 South Burdick Street address to 1000 South Burdick Street, Kalamazoo, Michigan 49001. CMS Ex. 4. By November 30, 2012, Petitioner had notified his surety bond insurance company of the change in his address. CMS Ex. 11. Petitioner also attempted to change his address with the State of Michigan's Department

of Licensing and Regulatory Affairs; however, that agency twice sent new license documents to Petitioner that showed an incorrect address. Petitioner's Brief (P. Br.) at 2. Ultimately, Petitioner obtained a new license that accurately reflected Petitioner's new address. CMS Ex. 8. While Petitioner was attempting to obtain a new license, Petitioner did not inform NSC that it changed locations. CMS Ex. 4.

On December 7, 2012, an NSC inspector attempted to conduct an on-site inspection of Petitioner's offices at the 610 South Burdick Street location. CMS Ex. 2. The inspector noted that the 610 South Burdick Street location did not have a sign or posted business hours of operation. CMS Ex. 2, at 3. Further, the inspector indicated that he spoke with the new tenant at 610 South Burdick Street who stated that Petitioner vacated that location in November 2012. CMS Ex. 2, at 7.

In a January 14, 2013 initial determination, NSC revoked Petitioner's Medicare billing privileges, effective December 7, 2012, and established a two-year re-enrollment bar. CMS Ex. 3, at 1. NSC indicated that, based on the December 7, 2012 site inspection, Petitioner violated the requirements in 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5)(ii). CMS Ex. 3, at 1-2. On January 23, 2013, Petitioner requested reconsideration of the revocation and submitted a corrective action plan (CAP) with a Form CMS-855S to formally change his address for Medicare purposes. CMS Exs. 4, 5. Petitioner did not contest that the December 7, 2012 site inspection occurred or that Petitioner was no longer at the 610 South Burdick Street location. Rather, Petitioner stated that he had to delay notifying NSC of the address change until he received a new state license to submit with the Form CMS-855S that accurately reflected his new address. CMS Ex. 4.

On March 22, 2013, NSC issued an unfavorable reconsidered determination.<sup>1</sup> CMS Ex. 14. The NSC hearing officer considered Petitioner's reason for failing to timely notify NSC of its address change. However, the hearing officer concluded: "The fact remains that the site inspector was unable to complete a site inspection for [Petitioner] because the facility location on record with the NSC was non-operational." CMS Ex. 14, at 3.

On April 22, 2013, Petitioner timely filed with the Departmental Appeals Board, Civil Remedies Division, a request for a hearing (RFH). Attached to the RFH were a number of case-related documents. In response to my May 8, 2013 Acknowledgment and Pre-hearing Order (Order), CMS filed a pre-hearing brief and motion for summary judgment with 14 proposed exhibits (CMS Exs. 1-14). Petitioner filed a pre-hearing brief in response with one exhibit (P. Ex. 1.)

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<sup>1</sup> The hearing officer noted in the reconsidered determination that NSC did not provide Petitioner with an opportunity to file a CAP. CMS Ex. 14, at 3; *see also* CMS Ex. 3. CMS correctly asserts that NSC did not have to offer Petitioner the opportunity to correct its deficiencies because NSC revoked Petitioner under 42 C.F.R. § 424.535(a)(5)(ii). *See* 42 C.F.R. § 424.535(a)(1); CMS Pre-hearing Brief at 9.

## II. Decision on the Record

Petitioner did not object to CMS's proposed exhibits. Therefore, I admit CMS Exs. 1 through 14 into the record.<sup>2</sup> However, P. Ex. 1 was printed from the NSC's website on July 11, 2013, and, therefore, P. Ex. 1 could not have been submitted to the NSC with his January 23, 2013 request for reconsideration. Because Petitioner did not state there was good cause for me to accept it, I must exclude it from the record. 42 C.F.R. § 498.56(e); Order ¶ 6.

Neither party submitted a witness list or any written direct testimony. Accordingly, the record is closed and I issue this decision based on the written record. *See* Order ¶ 11.

## III. Discussion

In order to participate in the Medicare program, a prospective supplier must complete the applicable enrollment application, which requires disclosure of the supplier's address. *See* 42 C.F.R. § 424.510(a). CMS may perform periodic revalidations and on-site reviews to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. 42 C.F.R. §§ 424.510(d)(8); 424.515(c), 424.517(a). CMS may revoke a supplier's enrollment if the supplier is not operational. 42 C.F.R. § 424.535(a)(5). CMS may revoke a DMEPOS supplier's enrollment if it fails to comply with any of the supplier standards. 42 C.F.R. § 424.57(d). The supplier standards require a supplier to maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7).

### A. Issue

Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a supplier in the Medicare program based on a determination that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5) and that it failed to comply with the supplier standards at 42 C.F.R. § 424.57(c)(7).

### B. Findings of Fact, Conclusions of Law, and Analysis<sup>3</sup>

- 1. During the December 7, 2012 site inspection of Petitioner's address on record with NSC (610 South Burdick Street, Kalamazoo, Michigan 49007), the site inspector observed that Petitioner's offices were no longer located at that address.*

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<sup>2</sup> CMS Exs. 4, 7-11, and 14 include all of the documents Petitioner attached to the RFH.

<sup>3</sup> My findings of fact and conclusions of law are set forth, in italics and bold font.

NSC's inspector conducted a site inspection of Petitioner's offices at the 610 South Burdick Street address on December 7, 2012. CMS Ex. 2. This was the address on record with NSC. CMS Ex. 14, at 3. This location did not have a sign with Petitioner's business name and did not have any hours of operation posted. CMS Ex. 2, at 3. The site inspector noted that the new tenant at the location stated that Petitioner vacated that address in November 2012. CMS Ex. 2, at 7.

Petitioner concedes that his business had relocated by November 15, 2012, and only disputes that there should not have been a new tenant at the 610 South Burdick Street location because Petitioner still had a lease on that location in December 2012. P. Br. at 1-2; RFH; CMS Ex. 4. Petitioner explained that he was delayed in informing NSC of the change in address due to difficulty in obtaining a new state license that reflected Petitioner's new address. P. Br. at 2; RFH; CMS Ex. 4. Based on a review of NSC's website, Petitioner believed that he had to attach a copy of his new state license to the Form CMS-855S in order to comply with CMS requirements for a change of address. P. Br. at 1-2; RFH; CMS Ex. 4.

Based on the evidence of record, I find that Petitioner's offices at the 610 South Burdick Street location were vacant after November 15, 2012, and that Petitioner did not notify NSC of the change in address within 30 days of that date.<sup>4</sup>

**2. CMS has a legitimate basis to revoke Petitioner's enrollment in the Medicare program because Petitioner was not operational pursuant to 42 C.F.R § 424.535(a)(5).**

CMS may revoke a currently enrolled supplier's Medicare billing privileges if:

CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services . . . .  
Upon on-site review, CMS determines that-

\* \* \* \*

(ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has

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<sup>4</sup> Petitioner had 30 days to inform NSC that it changed locations. See 42 C.F.R. §§ 424.57(c)(2), 424.516(c). Although NSC's site inspection occurred within 30 days of the date Petitioner moved to a new location, that fact is not material here. At the time NSC revoked Petitioner's billing privileges, which was beyond the 30-day deadline, Petitioner still had not notified NSC of its change in location.

failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

A supplier is “operational” when the supplier has a

qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

*Id.* § 424.502. CMS has authority to perform off-cycle revalidations that may be accompanied by site visits. *Id.* § 424.515(d). The purpose of a site visit is to verify information on file with the contractor and to confirm compliance with Medicare supplier standards. *Id.* § 424.517(a).

Petitioner admits that he did not submit a change of business address prior to the site inspection and the initial determination revoking his Medicare billing privileges. P. Br. at 2; RFH; CMS Ex. 4. Therefore, the undisputed facts indicate that CMS performed a site inspection that was within its authority and found that Petitioner’s offices were no longer located at the address listed in NSC’s records because Petitioner did not notify NSC that it had moved to a different location.

It was Petitioner’s obligation to timely notify NSC of any change in location. 42 C.F.R. §§ 424.57(c)(2), 424.516(c). Although Petitioner appears to have attempted in good faith to obtain a state license with an accurate address on it, nevertheless, Petitioner did not make any attempt to contact NSC within the required time to report a change in address.

Revocation of enrollment is a discretionary act of CMS, *see* 42 C.F.R. § 424.535(a), and through the reconsideration process, CMS can decide to exercise its discretion not to revoke a supplier should the circumstances warrant such action. *See* 42 C.F.R. § 498.24. However, I do not have the authority to review CMS’s discretionary act to revoke a provider or supplier. *Letantia Bussell*, DAB No. 2196, at 13 (2008). Rather, “the right to review of CMS’s determination by an [administrative law judge] serves to determine whether CMS has the authority to revoke [the provider’s or supplier’s] Medicare billing privileges, not to substitute the [administrative law judge’s] discretion about whether to revoke.” *Id.* Once CMS establishes a legal basis on which to proceed with a revocation, then the action to revoke is a permissible exercise of discretion. *See id.* at 10. Based on

